Nos. 84-493 and 84-1379

Supreme Court, U.S.
AUG 30 1985
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD THORNBURGH, *et al.*,

*Appellants,*

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*,

*Appellees.*

EUGENE F. DIAMOND, *et al.*,

*Appellants,*

v.

ALLAN G. CHARLES, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND SEVENTH CIRCUITS

## BRIEF *AMICI CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS, THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE, THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE, THE NATIONAL LAWYERS GUILD, AND THE NATIONAL TAY-SACHS AND ALLIED DISEASES ASSOCIATION

ANNE E. SIMON
*Counsel of Record*
NADINE TAUB
RHONDA COPELON
Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

JUDITH LEVIN
RABINOWITZ, BOUDIN, STANDARD, KRINSKY AND LIEBERMAN, P.C.
740 Broadway
New York, New York 10003-9518
(212) 254-1111

*Attorneys for Amici*

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## INTEREST OF AMICI[1]

THE CENTER FOR CONSTITUTIONAL RIGHTS ("CCR") is a non-profit litigation and educational organization. Founded in 1966 to provide legal support in the Southern civil rights movement, CCR has been a national resource for civil rights and social justice. Securing access to full reproductive rights for all women has been a priority for CCR.

THE COMMITTEE FOR ABORTION RIGHTS AND AGAINST STERILIZATION ABUSE ("CARASA") is a New York City-based organization of several hundred women and men dedicated to protecting and furthering women's ability to make choices about their reproductive health and lives, free

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[1]Letters indicating the consent of counsel for all parties to the filing of this brief have been filed with the Clerk of this Court.

from legal, social, and economic constraints. Founded in 1977, in response to the elimination of Medicaid funding for abortion, CARASA has long fought for access to abortion for all women, regardless of income or age, and for an end to coercive sterilization practices. It has also long fought for the availability of social and economic supports--such as child care, adequate wages or public assistance, and affordable housing--so that women who wish to have children can raise them in a safe and healthy environment.

THE NATIONAL EMERGENCY CIVIL LIBERTIES COMMITTEE ("NECLC") is a not-for-profit organization dedicated to the defense of the Bill of Rights, particularly for the poor and the powerless. Founded in 1951, the organization has worked to achieve its

goals through litigation and public education. The NECLC is committed to ensuring reproductive freedom for of all women and men.

THE NATIONAL LAWYERS GUILD ("NLG") is an organization of nearly 8,000 lawyers, legal workers, law teachers, and law students. Since its inception in 1937, the NLG has consistently worked on behalf of groups seeking social justice. Many of its members advise and represent women affected by laws which attempt to restrict freedom of choice. The NLG is particularly concerned that allowing the anti-abortion statutes at issue in this case to stand will effectively eliminate options currently available to women and their doctors, forcing women to continue unwanted pregnancies despite the risks they will incur.

THE NATIONAL TAY-SACHS AND ALLIED DISEASES ASSOCIATION is a non-profit organization supporting programs of detection, prevention and research into Tay-Sachs and similar genetic diseases occurring in infants and children. Children afflicted with Tay-Sachs disease, or one of the similar allied diseases, suffer severe mental and physical impairment, resulting in their deaths in infancy or very early childhood. The slow degeneration and eventual death of a child with one of these diseases has devastating and permanent effects on the child's parents and entire family. To help parents through this most difficult time, National Tay-Sachs sponsors a nationwide parent-peer communications network, which allows parents of affected children to obtain the emotional support they can only receive

from other parents of children with the same or similar diseases.

The National Tay-Sachs and Allied Diseases Association, established in 1958, has a membership of approximately 3,000 families. The organization's main purpose is to provide the medical and lay communities with information about the diseases' medical and social implications and the existence of a safe preventative screening measures.

At the close of 1984, approximately 500,000 young adults were screened for Tay-Sachs. Nearly 20,000 carriers have been identified, and over 1,300 pregnancies have been monitored by amniocentesis and chorionic villi sampling (CVS). As of June, 1984, 259 fetuses with Tay-Sachs disease were identified. The other monitored pregnancies resulted in over 1,000 babies being born free of Tay-Sachs disease.

The National Tay-Sachs and Allied Diseases Association firmly supports parents' choice to have children free of debilitating and/or terminal diseases.

## SUMMARY OF ARGUMENT

Both Illinois and Pennsylvania attempt to circumvent the clear command of Roe v. Wade and, by prescribing post-viability abortion procedures which diminish women's physical health needs and ignore their mental and emotional health, prohibit such abortions altogether.

Both statutes exalt the state's interest in the potential life of the fetus over the actual lives of women seeking to terminate their pregnancies. Both statutes, in design and effect, impermissibly demean a woman's moral and intellectual decision-making role in the very rare case of post-viability abortion.

The cumulative effect of these statutes is to discourage women from choosing abortion after viability and punish those women who are not deterred. Even for women determined to exercise their constitutional rights, the statutes create a climate of fear and uncertainty within the medical profession which will deter doctors from providing such abortions and achieve the unconstitutional goal not by prohibiting of abortion after viability in haec verba, but by ensuring that the medical community does not make them available to women.

## INTRODUCTORY STATEMENT

Reproductive autonomy is at the core of personal freedom. Without it, guarantees of equality are illusory. Women who cannot control when and how many children they will bring into this world cannot participate as free and equal

people in family, social, political, and economic life.

Cognizant of the importance to women of the right to choose abortion, this Court has, for more than a decade, held "that the right of privacy grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 419 (1983), citing Roe v. Wade, 410 U.S. 113 (1973). In so doing, the Court recognized that the right to choose abortion, like the right not to be subjected to involuntary sterilization, Skinner v. Oklahoma, 316 U.S. 535 (1942), is a fundamental aspect of the basic civil right to reproductive autonomy. Since Roe v. Wade, this Court has repeatedly upheld the right to abortion in the face of numerous legislative attempts to

subvert it. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976);Colautti v. Franklin, 439 U.S. 379 (1979); Bellotti v. Baird, 443 U.S. 622 (1979). Only two years ago, this Court, in Akron, firmly rejected the suggestion that these cases were wrongly decided and explicitly reaffirmed Roe v. Wade.

Nevertheless, this Court is again being asked both to abandon principles of stare decisis and to deny women the fundamental right of reproductive autonomy that it has enunciated and protected for more than a decade. The Solicitor General argues that this Court should not respect the right to choose abortion because neither the text of the Fourteenth Amendment nor its history explicitly mentions abortion. Brief for the United States as Amicus Curiae in Support of Appellants at 23-30. It is absurd to

contend that, because the drafters of the Fourteenth Amendment were not specifically occupied with the question of abortion, this Court cannot now guarantee the right of procreative choice.

Akron made clear that "the history of this Court's constitutional adjudication leaves no doubt that 'the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the specific guarantees elsewhere provided in the Constitution.'" 462 U.S. at 426-27, quoting Poe v. Ullman, 367 U.S. 497, 543 (1961)(Harlan, J., dissenting). The absence of conclusive evidence of the Amendment's intended effect on access to an important civil right should not determine the outcome here any more than it did in Brown v. Board of Education, 347 U.S. 483 (1954). In this case, as in Brown, "we cannot

turn the clock back to 1868 when the Amendment was adopted." Id. at 492.

It is not surprising that the right to abortion was not addressed in 1868. As the Roe Court was well aware, abortion was a legally permitted option for women well into the 19th century, 410 U.S. at 141, and, as historians tell us, it was an accepted practice well after restrictive legislation was enacted.[2] Focusing instead on the problems brought about by

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[2] See, e.g., The Human Life Bill: Hearings before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, on S. 157, A Bill to Provide that Human Life Shall Be Deemed to Exist from Conception, 97th Congress, 1st Sess. 437-38. (Statement of Dr. Carl Degler, Margaret Byrne Professor of American History, Stanford University). One important reason why anti-abortion measures enacted in the 1860's and 1870's failed to alter official practice was the continuing tolerance of the practice shown by state and local courts in abortion cases. The shift in judicial attitude toward abortion did not begin until the 1880's. J. Mohr, Abortion in America 230 (1978).

the recently concluded Civil War, the framers of the Fourteenth Amendment concentrated on the overriding national issue of guaranteeing rights to the newly emancipated slaves. Thus, for many groups and for women in particular, the war-time Amendments were initially of little assistance in their struggle for basic civil rights. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1873).

Developments in law and society, however, have poured additional meaning into the broad guarantees of the Fourteenth Amendment. Accordingly, in recent years, the Court has repeatedly held that the Fourteenth Amendment guarantees women an opportunity to participate fully in society, no longer relegating them to the domestic sphere of childbearing and

childrearing, see e.g., Reed v. Reed, 404 U.S. 71 (1971) Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975), just as it now affords both women and men reproductive autonomy.

The recognition of the abortion right evolved out of a steady and growing acceptance of a right of personal privacy extending to family matters including childrearing, procreation, and marriage. See e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Skinner v. Oklahoma, 316 U.S. 535 (1942); Prince v. Massachusetts, 321 U.S. 158 (1944); Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Eisenstadt v. Baird, 405 U.S.438 (1972).[3]

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[3]As this Court recognized in Roe,
(Footnote Continued)

The right to abortion also has close connections with the values embodied in the Thirteenth Amendment, which prohibits all slavery and involuntary servitude, "irrespective of the manner or authority by which it is created." Clyatt v. United States, 197 U.S. 207, 25 S.Ct. 429, 430 (1905). "While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons..." Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 146, 151 (1911). By forbidding coerced service, it guarantees to all people the right to consent to labor.

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(Footnote Continued)
the right to abortion is also closely connected to the common law immunity given to control of one's body. Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891). 410 U.S. at 152. This common law right was given constitutional significance in Terry v. Ohio, 392 U.S. 1 (1968).

Pregnancy and the labor of childbirth are work of the most intimate continuous kind. Pregnancy and childbirth involve vast physical changes in a woman's body and potentially severe pain and discomfort. They involve degrees of risk to life and health from the very serious to the relatively minor. Women undertake voluntary pregnancies cognizant of these risks and burdens. When chosen, when a child is desired, pregnancy may be hard but nonetheless a labor of love. When forced, pregnancy is an intolerable, dehumanizing form of servitude. The right to choose abortion, because it is essential to guarantee women's consent to this labor, is deeply rooted in the core value of the Thirteenth Amendment.

The abortion right, then, is tied both to the Fourteenth Amendment's concept of personal liberty and the Thirteenth Amendment's charter of freedom

from the degradation of forced labor. So rooted, so crucial to women, and so recently reaffirmed, it is a right that must again be respected.

## I. BOTH ILLINOIS AND PENNSYLVANIA IMPERMISSIBLY ELEVATE THE STATE INTEREST IN THE POTENTIAL LIFE OF THE FETUS ABOVE WOMEN'S RIGHTS TO LIFE, HEALTH AND PRIVACY IN AN ATTEMPT TO DETER AND PUNISH ABORTIONS LATE IN PREGNANCY

The Illinois and Pennsylvania statutes before the Court on these appeals contain a variety of unconstitutional provisions restricting abortion. Of particular concern to amici are those which sacrifice women's health--physical and emotional--to the purportedly viable fetus.[4] These are the latest in a long

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[4] Amici, although limiting this brief to the viability-related issues, urge affirmance of the judgments of the Courts of Appeals for the Third and Seventh Circuits striking down all Pennsylvania

(Footnote Continued)

line of local laws which attempt to distort this Court's holding in Roe v. Wade that a state's compelling interest in the potential life of the viable fetus can justify laws restricting abortion only if those laws do not jeopardize women's lives or health.

The Pennsylvania Abortion Control Act mandates that doctors terminating pregnancies after viability employ the abortion procedure most likely to result in a live birth unless such procedure "present[s] a significantly greater medical risk" to the woman. Pennsylvania explicitly excludes "the psychological or emotional impact on the mother of the unborn child's survival" from the comparative risk determination. 19 Pa. Cons. Stat. Ann. 3210(b) (Purdon 1983).

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(Footnote Continued)
and Illinois provisions burdening the right to choose abortion.

The Illinois statutory scheme permits no consideration of women's life or health in selecting the procedure for post-viability abortions. Ill. Rev. Stat. ch. 38 ¶¶81-26(1),(4) (1983).[5] A physician is excused from a primary duty to preserve fetal life if it "would increase medical risk" to the woman only after the procedure is underway. Id. ¶81-26(5).

These provisions affect very few abortions--less than one percent of all abortions performed.[6] These few late

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[5]Section 6(1) of the Illinois statute appears to unconstitutionally proscribe all post-viability abortions. See Point II,A, infra.

[6]Ninety-nine percent of abortions in 1981 were performed at 20 or fewer weeks gestation (LMP), Grimes, Second Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 264 (1984); Based on 1980 data, it has been suggested that only about 0.01% of all abortions are performed at more than 24 weeks'

(Footnote Continued)

abortions are necessarily late, chosen as they are for reasons which do not arise or are not apparent until later in pregnancy, and the need for them is grave. The statutes at issue here presume that, in this small but significant number of cases, women together with their physicians are incapable of appropriate decision-making.

A. Abortions At or After Viability Are Requested and Performed for Compelling Physical and/or Mental Health Reasons.

A variety of circumstances compel women to choose abortion late in

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(Footnote Continued)
gestation. Henshaw, Binkin, Blaine, Smith, A Portrait of American Women Who Obtain Abortions, 17 Family Planning Perspectives 90, 91 (1985). As shown infra Point II,C, a substantial proportion of this small number of late abortions are performed on women carrying non-viable fetuses. Fetal survival at less than 24 weeks gestation and 600 grams has not been reliably documented. Id.

pregnancy. One circumstance, noted by the Court in Colautti, is the discovery of severe, even fatal, fetal defects. The safest current method of detecting genetic defects is amniocentesis, a test which must be performed well into the second trimester of pregnancy, with results seldom being available before the 19th week of pregnancy.

Were it not for such option of late abortion, many women would choose to abort healthy pregnancies early, for fear that the fetus would be severely defective. Only the possibility of late abortions permits these women to have healthy, wanted children.[7]

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[7]The overwhelming majority of tests for fetal abnormalities are negative, allowing the woman to continue the pregnancy without that anxiety. Simpson and Verp, Prenatal Diagnosis of Genetic Disorders, Principles of Obstetrics, 130-32 (R. Caplan ed. 1982); Caplan,

(Footnote Continued)

The problems of giving birth to a child with a severe genetic defect are many and profound. The mother of a child with Tay-Sachs disease put it succinctly: "Once you've had a child with Tay-Sachs, you can't bring another into the world." "Breakthroughs in Prenatal Testing Give Hope to High-Risk Couples," Wall Street Journal, July 22, 1985, p. 21. For a moving account of the tragedy of Tay-Sachs, see, M. Silver, "Life After Tay Sachs," 99 Jewish Monthly, A Publication of B'nai B'rith, No. 10, pp. 14 et seq. (June-July, 1985).

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(Footnote Continued)
Antenatal Care, Principles of Obstetrics, 104 (R. Caplan ed. 1982). This testing process has been estimated to result in abortions in only two to five per cent of the 75,000 or so cases of diagnostic amniocentesis annually. Grimes, Second-Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 261 (1984). This is a tiny percentage of all abortions, but it is a critical one.

One study of parents of children with cystic fibrosis reveals the parents' perceptions.

> ...one mother, who had lost a first-born son, said: 'I often wish he hadn't been born -- for he didn't ask to be born, and if I'd known or thought we would pass on this disease, he'd never have been born.' One mother, who said she had not been told the disease was inherited until she had lost three children, commented: 'If I had known I wouldn't have had any more. It does make me feel guilty having so many. I think it's because they've suffered -- they definitely must suffer having their lungs affected.'

L. Burton, The Family Life of Sick Children 213 (1975).

These problems have a devastating effect on the woman and her family. A woman may not have the psychological or financial resources or the physical energy to cope with a severely damaged child. She may already be caring for other children or a disabled family member. If she gives birth to a child with a birth or congenital defect who requires

constant care, she will be forced to concentrate her energies on the care of the newborn to the detriment of other children or family members, or to give up financially vital employment. Thus, women's health often necessitates an abortion in these tragic circumstances.

Other circumstances requiring late abortions include the sudden or suddenly critical illness of the woman later in pregnancy. Conditions such as pre-eclampsia, diabetes, heart disease, cancer, high blood pressure and kidney disease, either arise or worsen later in pregnancy and necessitate abortions at or after viability--often on an emergency basis.[8] Further, young and poor women,

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[8] See generally, F. Arias, ed., High-Risk Pregnancy and Delivery (1984); See also, Knight and Arias, Third Trimester Bleeding, Id. at 287; Arias, Hypertension During Pregnancy, Id. at 100.

who do not have ready access to health care, delay obtaining abortions necessary to preserve their lives and health because they are unaware of their availability or unable to raise the funds necessary to secure them. The very young and the very poor are the women to whom pregnancy presents the greatest health risk.[9]

When the need for abortion does not arise or become known until late in pregnancy, time is needed to make the decision and, if the decision is to abort, the relative unavailability of

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[9] In 1981, more than one third of all post-first-trimester abortions were obtained by women under the age of 20. Grimes, Second-Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 262 (1984); Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Won't Go Away (1981); Singh, Torres, and Forrest, "The Need For Pre-Natal Care in the U.S.: Evidence From The 1980 Natality Survey," 17 Family Planning Perspectives 118 (1985).

late abortion procedures results in additional delay.[10] In extreme cases, these women may be at the brink of viability when they are finally able to obtain abortions.

If a woman decides to continue a life or health-threatening pregnancy, she cannot be told that the state has concluded that it is not worth the risk. Similarly, a woman who opts for abortion cannot be forced by the state to risk a birth.

B. The Statutory Schemes Compel Disastrous Outcomes.

Both statutes also preclude consideration of the terrible suffering that

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[10] Only a miniscule percent of all abortion providers offer procedures late in pregnancy and it is difficult and time-consuming to locate an appropriate facility. Alan Guttmacher Institute, Public Policy Issue in Brief, February 1983, at 3.

accompanies attempts to produce live births. The statutory language gives the impression that living, healthy infants will be produced. In fact, that result is unlikely. Virtually all of the very few infants born alive from the statutorily mandated procedures would be of extremely low birth weight (1000 grams or less).[11] One recent study showed that fewer than half of all such babies survived to leave the hospital. Most of the deaths occurred within the first month. The lower the birth weight, the worse the chances for survival: more than

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[11] The measurements of development in utero and after birth differ, and are not simple to reconcile. Gestational age is the crucial measure in utero; weight is more widely used after birth. Moreover, "the most important information that an obstetrician requires prior to the interruption of a compromised pregnancy is the status of the fetal lung..." Hobbing, A technical approach to uncertain dates, Perinatal Intensive Care 123, 126 (S. Aladjem and A. Brown eds. 1977).

97% of the infants 501-600 grams died; about 70% of those of 601-700 grams and almost 30% of those of 901-1000 grams died. Saigal, Rosenbaum, Stoskopf, Sinclair, Outcome in infants 501 to 1000 gm birth weight delivered to residents of the McMaster Health Region, 105 J. Pediatrics 969, 974 (1984). Of the infants who had survived through the study period, about half had handicapping conditions the researchers classified as either "major" or "moderate." Id. See also Hirata, Epcar, Walsh, Mednick, Harris, McGinnis, Sehring, Papedo, Survival and outcome of infants 501 to 750 gm: A six-year experience, 102 J. Pediatrics 741 (1983) (60% of such infants in newborn intensive care units died; of the survivors, all were below fiftieth percentile in growth by age 3; one-third were of borderline or lower

intelligence by age 4; 8% died after discharge from hospital).

These outcomes, and the measures required to attain even them, are far from costless for the mother. The anxiety, alienation, disruption to the family and grief of having an infant die or spend months in intensive care (and then probably die) are staggering. See Stinson, The Long Dying of Baby Andrew (1983); Siegel, Gardner, Merenstein, Families in crisis: theoretical and practical considerations in Handbook of Neonatal Intensive Care 421 (G. Merenstein and S. Gardner eds. 1985); Gardner and Merenstein, Grief and Perinatal Loss in id 449. So are the financial costs. Moreover, years of special care are likely to be required if the child survives.

A woman may, of course, freely choose to take these risks.[12] When she has considered and decided not to take them, however, the state is not permitted to override her choice in practice, while appearing to honor it in theory.

The suffering is not obviated by the possibility that a woman may put up her "aborted alive" child for adoption. Many children in that situation will be considered too much at risk to be adoptable. See Stinson, supra. The woman's life will in any event have been drastically changed by the pregnancy and birth. The problems of giving up a child for adoption are particularly acute for

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[12] Women who want to carry to term fetuses with severe defects or life-threatening conditions and rear their disabled children are entitled to the resources and societal support necessary to assure the best possible life prospects.

women because they bear a disproportionate burden of responsibility for children, as well as all the stress of childbirth. Among the psychological burdens of forced childbearing followed by adoption is debilitating anguish over having abdicated responsibility for a child, regardless of the woman's actual ability to fulfill such responsibility had she kept the child. Furthermore, familial and social ostracism may result if the relinquishment is perceived as an abandonment of the child. See, e.g., B. Lifton, Lost and Found: The Adoption Experience 207-27 (1979); Regan, Rewriting Roe v. Wade, 77 Mich L. Rev. 1569, 1589 (1979); Kilibanoff, Genealogical Information in Adoption, 11 Family Law Quarterly 185, 195 (1977).[13]

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[13]In a study of thirty-eight birth parents who have given up children to

(Footnote Continued)

C. The Statutes Disregard Women's Health.

The statutory language attempts to create an illusion of fairness by balancing "the life and health of any unborn child" against "the life or health of the pregnant woman." Roe makes clear, however, that the life and health of a pregnant woman outweigh the state's interest in the potential life of the viable fetus. Moreover, the statute in fact impermissibly weights the balance in favor of the state's protection of fetal

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(Footnote Continued)
adoption between one and thirty-three years before the survey, it was found that "[e]ven if the birth parents had become comfortable with the decision because there were no viable alternatives they nevertheless felt loss, pain, mourning, and a continuing sense of caring for that long vanished child." A. Sorosky, A. Baran, & R. Pannor, The Adoption Triangle 72 (1978). The authors liken relinquishment to a psychological amputation," and present the letters of birth parents expressing their inability to resolve their feelings or forget the children they gave up. Id. at 47-72.

potential. The provision applies only to physical health, without any extraneous female "emotional" factors.[14] Far from being a humane accommodation between competing interests, it reduces a woman to mere physicality. The prohibition on consideration of mental health says that a woman is only a maternal machine that is entitled to be saved from gross

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[14] Indeed, by requiring women to bear "significantly greater medical risk," the Pennsylvania statute even requires women to sacrifice their physical health and possibly their lives in the service of a viable fetus. This demand is clearly foreclosed by this Court's precedents. Roe identified the State's compelling interest in the potential life of the fetus at viability, but made clear that its force stopped at the point of "the life or health of the mother." 410 U.S. at 163-64. The Court of Appeals held that the State can not force doctors to weigh the degree of increased danger to a woman's health against a possible benefit to a viable fetus. A.C.O.G. v. Thornburgh, 737 F.2d at 283, 300 (1984), citing Colautti v. Franklin, 439 U.S. at 400. Any increased danger to the woman overrides the State's interest in fetal potential.

physical damage; she is not a person whose life and future matter.

The artificial definition of "health" is unconstitutionally restrictive. This Court has long recognized that "health" is a complex of factors, "physical, emotional, psychological, familial, and the woman's age--relevant to the well-being of the patient." Doe v. Bolton, 410 U.S. at 192. See also United States v. Vuitch, 402 U.S. 62, 72 (1971). Such an attempt to legislate women's psychological well-being out of existence violates the constitutional mandate of Roe and Doe.

These statutes are unlike the requirement upheld in Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983), that a second doctor attend post-viability abortions. The Missouri provision at issue in Ashcroft protected a baby--a person--

born alive after an abortion procedure. It did not compel an abortion method designed to trigger the need for a second doctor.[15] Here, the states assert their interest in the potential life of a fetus still in utero and seek to compel its actualization with little, if any, regard for the health of the pregnant woman.[16]

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[15]Another provision in the Missouri statute, not before the Court in Ashcroft, did forbid "the use of abortion procedures fatal to the viable fetus unless alternative procedures pose a greater risk to the health of the woman." 462 U.S. at 483. However, that provision did not, unlike the statutes before the Court on this appeal, constrict the definition of health or prevent a woman, in consultation with her physician, from basing her choice of post-viability procedure on all the aspects of her health recognized in Doe v. Bolton. See Planned Parenthood Asso. of Kansas City v. Ashcroft, 655 F.2d 848, 862-63 (8th Cir. 1981).

[16]In Ashcroft, Justice Powell, reviewing the testimony of a single abortion provider, noted that the record in that case lacked an explanation of "the circumstances when there were

(Footnote Continued)

The solicitude for fetal potential, as expressed in these provisions, exceeds a state's constitutional powers and invades women's constitutional rights. The statutes turn Roe on its head, preferring the potentiality of fetal life to the reality of women's lives, and refusing to recognize women as "persons in the whole sense." 410 U.S. at 162.

D. The Statutes Cruelly Punish Women Who Choose Abortion.

Inherent on the face of the Pennsylvania statute and in the Illinois scheme, is a wholly false distinction

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(Footnote Continued)
'contraindications' against the use of any of the procedures that could preserve viability. . ." 462 U.S. at 483-85, n. 7. The question, however, is not one of provider preference. It is a grave matter of women's total health needs--including mental health, emotional and familial considerations. After all, it is the woman, in consultation with her physician, who makes the choice of procedure, not the physician alone based on his or her convenience or personal views.

between the "psychological and emotional impact . . . of the unborn child's survival" and the mental health reasons for which a woman sought the abortion in the first place. This Court in Roe recognized the importance of the woman's health by limiting the state's power to prohibit post-viability abortions to those cases not jeopardizing women's health. The Pennsylvania statute purports to adhere to Roe by incorporating preservation of the woman's life or health as a reason for abortion in §3210(a). Yet it completely undercuts women's health in §3210(b), which says that, although the health impact of bearing a child can be the basis for an abortion, the state can force a woman to live with exactly the detrimental consequences the abortion was supposed to forestall. This is as cruel as it is absurd.

In addition, the process of forced birth and subsequent surrender have further consequences. A woman, having given birth to a child, must go through the rest of her life with the child's well-being as an unanswered and unanswerable question. Is the child with a loving family? Has the child been left, neglected, in an inferior institution? Has the child received a proper education? In our society, giving birth means having a host of social and emotional connections to the child, even if the birth was unwanted and coerced. These statutes foist those connections, and the difficulty and pain of dealing with them, on women who have considered and rejected them.

Nor would the unconstitutional impact of the statutes be ameliorated in the event that techniques ever improved sufficiently to save almost all extremely

low birth weight infants and afford them a reasonably good prognosis.[17] The state's command to women to produce babies can not be reconciled with the fundamental rights of autonomy and bodily integrity that are part of the constitutional guarantee of privacy. These statutes represent a state choice for reproductive compulsion, a choice can not be made consistent with our Constitution. Cf. A. Huxley, Brave New World (1939).

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[17]The time required for the development of the human lung sets a lower limit on the possibilities of neonatal survival. See experts quoted in Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 1024 (1984). See also n. 11, supra.

E. The Statutes Inhibit and Deter Women From Making Reproductive Choices.

These provisions have indirect effects that are as pernicious, and unconstitutional, as their direct effects. By mandating the use of abortion methods that could result in a live birth, the state forces a woman to run the risk of giving birth, very prematurely, to a child who has little chance for a healthy life--when what she has decided on is an abortion, not a birth. Faced with this state-imposed risk, women may very well "choose" to forego the abortion. They will opt to carry their pregnancies as close to term as their health will permit. A woman compelled to have the child she would have chosen not to have may sacrifice her own life and health--and the well being of the rest of her family--to improve the quality of the life of the new child. Women do not want

their children to die, or lead painful and constricted lives. That is often why they choose abortion. If the state forces childbirth upon them when they would have chosen abortion, many women will act to assure the best possible outcome at birth. This Court should not mistake their humane reaction to a state compelled dilemma for a willing surrender of the right to an abortion.

Paradoxically, the statutes also deter women from choosing childbirth in many cases. By forcing women to face the prospect of live births of fetuses diagnosed to be fatally or severely defective, the statutes act to foreclose not only an option for abortion, but an option for birth. See Point I,A, supra. This Court has, since Skinner v. Oklahoma, made clear that the state can not interfere with the reproductive potential of individuals. Women for whom

amniocentesis holds the possibility of childbearing without fear of disaster should not be deprived by the states' rigidity about abortion of their opportunity to bear healthy children.

## II. THE STATUTES UNCONSTITUTIONALLY RESTRICT WOMEN'S ACCESS TO ABORTION BY IMPERMISSIBLY RESTRICTING THE ABILITY OF DOCTORS TO EXERCISE THEIR MEDICAL JUDGMENT.

Although appellant-intervenor Diamond[18] characterizes the Illinois regulation of post-viability abortions at issue here as an innocuous effort that "merely regulates the manner in which the physician may perform a post-viable abortion," Brief for Appellants at 37, in reality, the statutes erect a genuine obstacle for women in the form of

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[18] Illinois has not appealed to this Court and Williams, the only other intervenor below, has since died.

criminal sanctions for their doctors. These restrictions have an obvious, direct effect on women, who will not be able to find doctors willing to take the risks imposed on them.

A. Requiring a Physician Performing an Abortion to Treat a Fetus as Though it Were Being Born Alive is Unconstitutional.

Section 6(1)[19] of the Illinois law purports to impose the same standard of

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[19] No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of a fetus known to be viable before or after birth commits a Class 2 felony if the death of a

(Footnote Continued)

care on a physician "who intentionally terminates a pregnancy" post-viability as on a physician attending a live birth. Read literally, this would seem to prohibit the abortion, since the only way to meet this standard of care is to terminate the pregnancy as though a live birth were the desired outcome. This involves a very different course of medical treatment than would be

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(Footnote Continued)
viable fetus or infant results from such a failure.

The Court of Appeals noted that, in June, 1984, §6(1) was "substantially transformed" by amendment. 749 F.2d at 455. Amici therefore suggest that, although the Court of Appeals properly invalidated this provision, the issue is now moot. It is the current statute which governs the availability of abortions in Illinois. No woman could now be affected by the version of §6(1) considered by the Court of Appeals.

In the event that the Court determines that there is still a live controversy as to the decision of the Court of Appeals on §6(1), amici urge affirmance for the reasons here.

undertaken if a live birth were not the outcome sought. For example, in the case of a woman exhibiting placenta previa with moderate bleeding, either an abortion or an attempt to continue the pregnancy could be indicated, depending on the circumstances. If a woman elected to continue the pregnancy, she could be hospitalized for weeks, then undergo a Cesarian section.[20] Knight and Arias, Third Trimester Bleeding, in High-Risk Pregnancy and Delivery 285-87 (F. Arias ed. 1984).

If a woman elects to have an abortion, it should be performed immediately, not after an unnecessary and dangerous delay. Section 6(1) might well

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[20]For an account by parents of the agonizing death of a child born after doctors advised against an abortion in such a situation, see R. Stinson and P. Stinson, The Long Dying of Baby Andrew (1983).

require a woman whose health is threatened by continuation of the pregnancy to go to the brink of death before an abortion could be performed. Under Roe, as reaffirmed by Colautti, the health interest of the woman can not be disregarded until it has reached the point of being acutely life-threatening. The statute, therefore, is plainly invalid at this literal level.

Appellants, however, contend that §6(1) "requires that fetal protection measures be taken during the course of the abortion performed after viability." Brief for Appellants at 31. This reading makes the statute unconstitutionally vague. Since literal compliance is both medically and legally impossible, what is left is a statute requiring physicians to take "fetal protection measures." What are such measures? How heroically must they be pursued? At what

point will such measures impinge on the woman's health, and how will a physician know what to do then? In sum, it is completely unclear what the physician's duty of care could possibly be, or how it could be carried out.

Section 6(1) further imposes liability on doctors for conduct with respect to a fetus "known to be viable." The statute does not specify how or under what standards the knowledge is to be evaluated, or by whom. There are crucial omissions, rendering the statute unconstitutionally vague.

There is no consensus in the medical community about how great the chance for survival must be in order for a fetus to be considered viable.[21] There is also

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[21] Colautti at 388-89 quotes two physicians who gave different percentage figures and one who refused to use a

(Footnote Continued)

disagreement as to what variables should be accorded greatest weight.[22] As this Court has recognized,

> [t]he prospect of such disagreement, in conjunction with a statute imposing strict . . . criminal liability for an erroneous determination of viability could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment.

Colautti, 439 U.S. at 397.

Because the ascertainment of viability is dependent on many variables, viability determinations also may be

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(Footnote Continued)
fixed percentage. See also Roe, 410 U.S. at 159.

[22] Compare Williams Obstetrics 173 (J. Pritchard & E. MacDonald 16th ed. 1980), (favoring fetal age as the most reliable determinant of chance for survival ex utero) with Williams, et. al., Fetal Growth and Perinatal Viability in California, 59 Ob. Gyn. 624 (May 1982) (finding that birth weight plays a greater role than gestational age in predicting survivability).

inaccurate by as much as several weeks.[23] Even the most advanced instruments for assessing fetal age have a five-day margin of error, and this margin is greater if the woman does not undergo ultrasound between the eighth and twelfth weeks of pregnancy.[24] It is simply not possible to "know" objectively that a fetus is viable. The imposition of

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[23]Grimes, supra n. 9, at 260-61.

[24]Hohler, Multiple Ultrasound Measures of Fetus More Accurate, 18 Ob. Gyn. News 50 (May 15-31, 1983). Contrary to the assumption of the Illinois statute that viability is an empirically objective fact, the viability assessments of physicians are highly subjective ones, based largely on experience: "The choice of 26, 27, 28 or any other number of weeks as the point of medical viability by experts in the field is based on experience from observing thousands of premature births and the correlation of survivals with estimated fetal age." Lenow, The Fetus as Patient: Emerging Rights as a Person, 9 Amer. J. Law & Medicine 1 (1983); see also, Bolognese and Roberts, Amniotic Fluid, in Perinatal Medicine: Management of the High Risk Fetus and Neonate 198-203 (2d ed. 1982).

criminal penalties on physicians on the basis of a presumed knowledge that is not possible to obtain and inadequate standards is clearly unconstitutional.

The central problem of lack of accepted objective standards is exacerbated by the statute's failure to specify who makes the determination that the fetus at issue is viable. This opens the physician to possible second-guessing by state law enforcement personnel or other medical personnel. That prospect is what has led this Court to hold repeatedly that "[t]he determination of whether a particular fetus is viable is, and must be, a matter for the responsible attending physician." Planned Parenthood v. Danforth, 428 U.S. at 64, cited in Charles v. Daley, 749 F.2d at 459. See also Colautti v. Franklin, 439 U.S. at 396-97. The statute unconstitutionally leaves the physician in doubt on this

crucial point.

### B. Pennsylvania's Attempt to Create a Balance Between Fetal Viability and Risk to Women is Unconstitutionally Vague.

Section 3210(b) of the Pennsylvania statute requires physicians to choose a post-viability abortion method "which would provide the best opportunity for the unborn child to be aborted alive" unless the use of that method would pose a "significantly greater" risk to the woman. This section is impermissibly vague because it forces physicians to combine their estimate of viability and their estimate of "significantly greater" risk to women, then attempt to balance them, and threatens criminal penalties if they strike a balance that the State does not like. As noted in Section II.A, supra, viability is itself an estimate. Colautti, 439 U.S. at 395-96. Viability estimates vary widely from case to case

and from physician to physician. Colautti, 439 U.S. at 396, and n. 14.

Compounding the uncertainty inherent in the viability determination is the requirement that physicians assess the significance of the increased risk to the woman. In what respect must a risk be "significantly greater?" Physicians are then required to compare their estimates of the magnitude of benefit to the fetus with their estimates of the magnitude of harm to the woman. This Court's conclusion about an earlier attempt by Pennslyvania in this area is equally applicable to §3210(b): "The State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." Colautti, 439 U.S. at 401.

C. Reporting Requirements That Focus on a Physician's Determination of Viability Endanger Women and Unconstitutionally Chill Physicians

Section 3211 of the Pennsylvania statute requires a physician to

> determine whether, in his good faith judgment, the child is viable. When a physician has determined that a child is viable, he shall report the basis for his determination that the abortion is necessary to preserve maternal life or health. When a physician has determined that a child is not viable, he shall report the basis for such determination.

The Court of Appeals held that this requirement was unduly burdensome and furthered no compelling interest at the pre-viability stages. 737 F.2d at 301. Moreover, the requirement of reporting the basis for determining that "a child is not viable" creates an unnecessary and unconstitutional pressure on doctors.

The very language of the provision tells physicians that the state sees the fetus as a person ("a child"), contrary

to medical reality and the mandate of Roe. This attitude can only lead physicians to err on the side of the fetus in exercising their professional judgment, to the detriment of the woman and her rights.

The reporting requirements further impermissibly introduce the possibility of conflict between physicians' reporting duties and their medical judgment and responsibility to their patients. Deciding whether a fetus is viable in a marginal case is not, however, a simple or rapid process.[25] In some circumstances of urgent medical necessity, termination of pregnancy must be undertaken almost as soon as the

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[25]Experts recommend both ultrasound and amniocentesis. Knight and Arias Third Trimester Bleeding, in High-Risk Pregnancy and Delivery 287(F. Arias ed. 1984).

precipitating medical condition has been discovered.[26]

The reporting requirement compounds the disruption of the physician's judgment and practice begun by the viability focus of §3210(b). Should the physician take the time to make a full-scale viability determination that will satisfy the unknown persons who will later read the report at leisure? Even wondering about what to do can take valuable time in an emergency. The lack of direction to the physician about how to comply with this section, as well as the absence of an emergency exception to the requirements, render these provisions invalid.

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[26] E.g., placenta previa with severe hemorrhage, severe preeclampsia, carcinoma of the cervix. See n. 8, supra.

Under both the Illinois and the Pennsylvania statutory schemes, the fear of incurring criminal liability will induce doctors to err on the side of finding viability whenever the slightest chance of inaccuracy exists and to refuse to perform needed abortions. Because of the uncertainties inherent in determining viability, a large percentage of cases in which doctors are deterred from performing abortions will be of women carrying non-viable fetuses. The implementation of these statutes will undoubtedly result in the unconstitutional denial of abortions to women greatly in need of them.

D. The Statutes Straitjacket Doctors by Compelling Them to Convey Medically Inaccurate Information to Women Seeking Abortions.

Both the Illinois and Pennsylvania statutes require doctors to respond in a rigid, mechanical, and predetermined way when they attend patients seeking

abortions at or near viability. The statutes greatly circumscribe the exercise of physicians' medical judgment and distort the process of abortion care. By forcing doctors to inform their patients of an obligation to try to salvage the fetus, the statutes force them to perpetrate a cruel deception on pregnant women.

This is most pointedly the case with respect to Illinois §6(4), which has introduced an idea that can only be expressed as that of a "possibly viable" fetus.[27] This is simultaneously

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[27] No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of

(Footnote Continued)

redundant and confusing. Viability incorporates, by definition, a calculation of possibility.[28] A statutory scheme based on a possible possibility can not help physicians give women sound advice, especially since a pre-viable fetus will, by definition, die before or shortly after birth. Nor can it be a basis for criminal liability.[29]

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(Footnote Continued)

> the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of more than momentary survival of the fetus, apart from the body of the mother, with or without artificial support.

(emphasis added).

[28] Williams Obstetrics 587 (J. Pritchard & E. MacDonald, 16th ed. 1980) defines viability as a concept "widely used to identify a reasonable potential for subsequent survival if the fetus were to be removed from the uterus." (emphasis added).

[29] Illinois's perception of viability in §6(4) is so loose that it might even

(Footnote Continued)

In addition, Illinois §6(1) and Pennsylvania §3210(b), by creating criminal liability based on the physician's viability determination, distort the process of medical judgment. Even without the influence of the statutes, fetuses are wrongly deemed to be viable and die shortly after birth. The statutes, however, require physicians to act as though there are no marginal cases and

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justify an argument that the conceptus at any point is a "possibly viable" fetus, since in some sense it can survive for more than a moment outside the body of the woman, albeit with artificial support. Moreover, the phenomena of cloning, parthenogenesis and chimerism, demonstrate that the human zygote is not unique in its capacity to develop into an organisism. "If it is argued that a zygote should have the rights of personhood because it has the capacity to develop into a person, then one can also argue that an unfertilized egg should have the rights of personhood since it also may have the same capacity. Milby, The New Biology and the Question of Personhood: Implications for Abortion, 9 Amer. J.L. & Medicine 31, 32 (1983).

no countervailing factors: every fetus deemed viable must be treated in the same way, and every woman carrying such a fetus must be treated in the same way. This mandate denies to physicians the discretion and flexibility they need in order to make their best medical judgments in a difficult and sensitive area.

The statutes therefore require doctors to mislead their patients into believing that a reasonable possibility exists of giving birth to a baby able to sustain life, when, in fact, almost no possibility exists. In this way, not only do the statutes invade the privacy of the doctor-patient relationship, but they also actively encourage doctors to medically mislead pregnant women. This deception and the unnecessary grief it

will precipitate[30] cannot be overlooked in an evaluation of the statutes' unconstitutionality.

## III. SECTION 6(4) OF THE ILLINOIS STATUTE IMPERMISSIBLY REGULATES ABORTIONS PRIOR TO VIABILITY IN CONTRAVENTION OF ROE v. WADE.

The Court in Roe declared, and in Colautti confirmed, the invulnerability of pre-viability abortions to state interference for any reason not related to maternal health. Roe, 410 U.S. at 154, 159, 169; Colautti, 439 U.S. at 682. Illinois, however, has tried to impose a requirement that doctors use the same standard of care in aborting a fetus which has a "possibility" of "more than momentary" survival[31] as in bringing to

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[30] See Point 1,B, supra.

[31] The statute has since been amended. The Court of Appeals did not

(Footnote Continued)

birth a truly viable fetus. This is plainly an impermissible regulation of pre-viability abortions. By its own terms, §6(4) identifies a period in pregnancy prior to viability. Because there is a parallel requirement in §6(1) which is addressed to fetuses deemed "viable," the legislature clearly intended the two sections to refer to different points in pregnancy. See Colautti v. Franklin, 439 U.S. at 393; Charles v. Daley, 749 F.2d at 460.

This intrusion into the period prior to viability is not justifiable. This Court has held that statutes purporting

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(Footnote Continued)
pass on the validity of the amended version. 749 F.2d at 452. Amici suggest that, although the Court of Appeals properly invalidated this provision, the issue is now moot. See n. 19, supra. In the event that the Court determines that there is still a live controversy as to the decision of the Court of Appeals about §6(4), amici urge affirmance for the reasons stated here.

to regulate abortions prior to viability, except on grounds of maternal health, unconstitutionally infringe upon a woman's fundamental right of privacy under the Fourteenth Amendment. Colautti v. Franklin, 439 U.S. 379, 388 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 63-64 (1976). Appellants concede, as they must, that Illinois' alleged interest in the fetus prior to viability is not compelling. Brief of Appellants at 38, 43. They offer no maternal health justification for the statute. The Court of Appeals correctly noted that §6(4) "does not seek to protect the health of the mother." 749 F.2d at 461. Therefore, it can not stand.

Although appellants attempt to salvage their position by suggesting that the pre-viability stages are subject to a "balancing" of interests (Jurisdictional Statement at 55), it is clear that the privacy right recognized in Roe would be meaningless if the right could be so abridged prior to viability. The "balance" appellants call for has already been struck. Roe v. Wade, 410 U.S. at 164-65.

## CONCLUSION

The states' assertion of fetal primacy and their willingness to impose substantial and long-term hardships on women to implement that view goes well beyond constitutional bounds.

The judgments of the Court of Appeals for the Third Circuit and the Court of Appeals for the Seventh Circuit should be affirmed.

Dated: New York, N.Y.
August 30, 1985

Respectfully submitted,

ANNE E. SIMON
Counsel of Record
NADINE TAUB
RHONDA COPELON
Center for Constitutional Rights
853 Broadway
New York, NY 10003
(212) 674-3303

JUDITH LEVIN
Rabinowitz, Boudin, Standard, Krinsky and Lieberman, P.C.
740 Broadway
New York, NY 10003-9518
(212) 254-1111

Attorneys for Amici*

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* Counsel gratefully acknowledge the assistance of legal workers Joan L. Washington and Dorothy Zellner, and Sara Mandelbaum and Elizabeth Szabo, law students at the Rutgers School of Law, in the preparation of this brief.